No. 14356

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

VERN GEORGE DAVIDSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

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BRIEF OF APPELLEE.

I.

STATEMENT OF JURISDICTION.

Appellant was indicted by the Federal Grand Jury in and for the Southern District of California on July 8, 1953, under Section 462 of Title 50, App., United States Code, for refusing to submit to induction into the Armed Forces of the United States. [Tr. 3-4.]

On July 27, 1953, the appellant was arraigned and entered a plea of not guilty. On November 18, 1953, trial was begun in the United States District Court for the Southern District of California by the Honorable Harry C. Westover, without a jury. On November 30, 1953, appellant was found guilty as charged in the indictment.

[Tr. 6-14.] On December 7, 1953, appellant was sentenced to three years' imprisonment, and judgment was so entered. [Tr. 15-16.] Appellant appeals from this judgment.

The District Court had jurisdiction of this cause of action under Section 462 of Title 50, App., United States Code, and Section 3231 of Title 18, United States Code. This Court has jurisdiction under Section 1291 of Title 28, United States Code.

II.

STATUTE INVOLVED.

The indictment in this case was brought under Section 462 of Title 50, Appendix, United States Code, which provides in pertinent part:

> "(a) Any . . . person charged as herein provided with the duty of carrying out any of the provisions of this title [sections 451-470 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under oath in the execution of this title [said sections], or rules, regulations, or directions made pursuant to this title [said section] . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment. . . ."

III.
STATEMENT OF THE CASE.

The indictment returned on July 8, 1953, charges that the defendant was duly registered with Local Board No. 89, that he was thereafter classified I-A and notified to report for induction into the Armed Forces on October 17, 1952; and that the defendant thereafter knowingly failed and refused to be inducted into the Armed Forces of the United States. [Tr. 3-4.]

On July 27, 1953, appellant appeared for arraignment and plea represented by J. B. Tietz, Esquire, before the Honorable Peirson M. Hall, United States District Judge, and entered a plea of not guilty. On November 18 and 20, 1953, trial was held before the Honorable Harry C. Westover, United States District Judge, without a jury. On November 30, 1953, appellant was found guilty as charged in the indictment, and on December 7, 1953, was sentenced to three years' imprisonment. Appellant assigns as error the judgment of conviction on the following grounds:

A. The District Court erred in failing to grant the Motion for Judgment of Acquittal duly made at the close of all the evidence.

B. The District Court erred in convicting appellant and entering a judgment of guilty against him.

C. The District Court erred in refusing to permit the appellant to explain the answers he gave to the Court's questions.

IV.
STATEMENT OF THE FACTS.

On September 16, 1948, Vern George Davidson registered under the Selective Service System with Local Board No. 89, Los Angeles County, California. He was born on August 6, 1929, and was nineteen years old at the time of registration. He gave his occupation as "student."

On October 7, 1948, Davidson filed with Local Board No. 89 SSS Form 100, "Classification Questionnaire." In that Questionnaire he signed Series XIV and after his signature he affixed an asterisk and wrote, "See note attached." The note said:

> "It will be noted that I have signed Series XIV. I would like to make my position clear. I do conscientiously object to war and to conscription for any reason, but, my beliefs are not religious, they are basically political. As a political objector I shall resist this totalitarian rule by my own country as I would resist it in any other country. My position is briefly stated in the attached newspaper article by myself. If after considering these facts the Board feels that they wish to send me the form for conscientious objectors, I will be glad to fill it out and return it to the Board with the understanding that my objectuons [*sic*] are not religious but political."

There follows a letter from the appellant which he had sent to the *U. C. L. A. Daily Bruin.*

The Local Board mailed appellant SSS Form 150, "Special Form for Conscientious Objectors," which was received by the Local Board on February 27, 1950. In Series II of that form appellant was asked, "Do you believe in a Supreme Being?" He checked the answer, "No." With the special form for conscientious objectors appellant included another statement of his beliefs:

> "* * * I do not believe in the existence of a Supreme Being. My allegiance is not to any god or country, it is to humanity as a whole. * * * This cannot be classified, then, as religious objection to war. If my objections are criminal because they are based on rationality instead of superstition, then it must be so, but I will object and I will refuse to do military service. * * * My references are not to substantiate any religious beliefs but rather my humanitarian and philosophical views."

On July 12, 1950, appellant was classified I-A by a vote of 3 to 0, and on July 13, 1950, SSS Form 110, "Notice of Classification," was mailed appellant.

On July 26, 1950, the Local Board received a letter from appellant restating his views and requesting an appeal of his classification. Although the ten-day period for appeal had passed, the Local Board honored his request, and on August 15, 1950 forwarded appellant's file to the Appeal Board. Meanwhile, appellant had taken an Armed Forces physical examination and had been found acceptable for military duty.

On appeal, appellant's case was referred to the Department of Justice who conducted an investigation and hearing. On January 8, 1951, the Department of Justice wrote the Appeal Board recommending that appellant be not classified as a conscientious objector.

On February 13, 1951, appellant was classified I-A by the Appeal Board by a vote of 5 to 0, and on February 19, 1951, was mailed SSS Form 110, "Notice of Classification."

On February 19, 1951, appellant was mailed SSS Form 252, "Order to Report for Induction," but induction was postponed four days later because appellant was a student.

On August 29, 1951, appellant was again classified I-A by a vote of 2 to 0, and SSS Form 110, "Notice of Classification," was mailed the same date.

On September 7, 1951, Form C-190 was mailed appellant, ordering him to report for induction on September 18, 1951. On September 10, 1951, a letter of appeal was received, and on September 13, 1951, induction was postponed. On September 14, 1951, appellant's file was forwarded to the Appeal Board.

On appeal, the matter was again referred to the Department of Justice. On this occasion no hearing was conducted. On July 29, 1952, the Department of Justice wrote the Appeal Board recommending that appellant be not classified as a conscientious objector.

On August 19, 1952, appellant was classified I-A by the Appeal Board by a vote of 4 to 0, and on August 21, 1952, was mailed SSS Form 110, "Notice of Classification."

Meanwhile, the Local Board had received a request from appellant and from the Socialist Party requesting a deferred classification of II-A for appellant. On September 17, 1952, the Local Board reviewed appellant's case and determined not to re-open it, by a vote of 2 to 0. On September 18, 1952, appellant and the Socialist Party were advised of the Local Board's decision.

On October 1, 1952, appellant was mailed SSS Form 252, "Order to Report for Induction," ordering him to report on October 17, 1952. Thereafter appellant requested a postponement of inductment, which was denied. On October 17, 1952, appellant reported for induction as ordered, but refused to be inducted into the Armed Forces of the United States.

V.

ARGUMENT.

A.

On Appeal From His Classification of August 29, 1951, the Defendant Was Not Entitled to an Investigation and Hearing Conducted by the Justice Department.

The provisions concerning conscientious objectors in the Universal Military Training and Service Act of 1948 are found in Title 50, App., United States Code, Section 456(j), which provides in pertinent part:

> "Nothing contained in this title * * * shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. * * * Any person claiming exemption from combatant training and service because of *such* conscientious objections shall, if *such* claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. * * * the appeal board shall refer any *such* claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing." (Emphasis added.)

The statute does not say that when *any* claim for a conscientious objector's classification is made the matter shall be referred to the Department of Justice. It provides that any person claiming an exemption because of *"such* conscientious objections" is entitled to the special procedure. (Emphasis added.) Similar language is used in the Selective Service regulations. Section 1626.25 (32 C. F. R. 1626.25) relates to the procedure on appeal when a question of a conscientious objector's classification is involved. The language used throughout that section is, "if the registrant has claimed, *by reason of religious training and belief,* to be conscientiously opposed to participation in war in any form." (Emphasis added.)

Further, it is apparent from a reading of the statute that the purpose of the investigation and hearing by the Department of Justice is to test the character and good faith of a registrant, or, as some courts have expressed it, to determine if he is a "conscientious" conscientious objector. This being the purpose, it follows that an investigation and hearing are not required where the claim for a conscientious objector's classification *on its face* falls outside the limits of the statute.

Thus, before a registrant is entitled to the special procedures in Section 6(j) of the Universal Military Training and Service Act, he must at least assert that his objections to military training and service *are based on religious training and belief.*

Did appellant make such a claim? Appellant filled out SSS Form No. 100, "classification Questionnaire," and signed Series XIV, "Conscientious Objection to War." After his signature he attached an asterisk and made the notation, "See note attached." [Ex. 1, p. 15.] Attached was the following note [Ex. 1, p. 11]:

> "* * * My beliefs are not religious, they are basically political. As a political objector I shall resist this totalitarian move by my own country as I would resist it in any other country. * * * If after considering these facts the Board feels that they wish to send me the form for conscientious objectors, I will be glad to fill it out and return it to the Board with the understanding that my objections are not religious but political."

Thereafter, in February, 1950, appellant completed and filed SSS Form No. 150, "Special Form for Conscientious Objector." [Ex. 1, p. 20.] Under Series I, "Claim for Exemption," appellant claimed neither the exemption from all armed forces duty, nor the one for combatant training only. Under Series II, "Religious Training and Beliefs," appellant was asked the following question: "Do you believe in a Supreme Being?" Appellant checked the answer, "No." Attached to the special form for conscientious objectors was the defendant's statement of his beliefs:

> "I am not a member, or would I be considered a follower of any religion or religious sect. I do not believe in the existence of a Supreme Being. My allegiance is not to any god or any country, it is to humanity as a whole. * * * This cannot be classified, then, as religious objection to war. If my objections are criminal because they are based on rationality instead of superstition, then it must be so, * * * My references are not to substantiate any religious beliefs but rather my humanitarian and philosophical views."

After appellant was classified I-A, he wrote the Board on July 24, 1950 [Ex. 1, p. 27]:

> "* * * I have explained before that as a socialist, as a member of the Socialist Party, I hold a duty to humanity which I will not subjugate for the duty

> to a state. * * * If ever the use of force by one individual is justified, it can only be when the individuals concerned have decided rationally that they should indulge in the use of force, it is never justified as mass, unrational action. * * * You ask us to slaughter Korean peasants because the U. S.'s support of an insufferable government against an equally corrupt government in its game of chest [*sic*] with Russia over the future of the world has resulted in an imperialist war. You ask us to serve—contrary to the opinion of must [*sic*] world government—against the legitimate government of China in support of Nationalist China. * * * You ask us to serve as an imperialist force of intimidation against the rest of the world. This is a duty that I, as a free human being and a Socialist, refuse to accept."

It is clear from the defendant's own language that he did not make "such a claim" as would entitle him to an inquiry and hearing by the Department of Justice when his request for a conscientious objector's classification was denied. He does not believe in a Supreme Being. His objections to war are not religious. His objections to war are political, sociological and humanitarian. He objects to this particular war as "imperialist"—not a ground for exemption. *United States v. Kanter,* 133 F. 2d 703. His statements specifically exclude the possibility that in addition to being political, philosophical and humanitarian, they might be based upon religious training and belief in relation to a Supreme Being. He could not have better included himself in the group *specifically excluded by Congress* had he taken the statute and copied its words. Appellant's claim was invalid on its face.

A somewhat similar situation existed in *Berman v. United States,* 156 F. 2d 377. In that case the court said at page 381:

> "Whether or not the triers of fact thought appellant's objections to war were conscientious is not decisive of this case. Even if the evidence should compel the finding that he was conscientious, * * * he could not succeed in his appeal. There is not a shred of evidence in the case to the effect that appellant relates his way of life or his objection to war to any religious training or belief."

What the court said in that case is equally true in this one. All can agree that appellant is conscientious in his beliefs, and yet, assuming that to be a fact, he could not prevail as a conscientious objector because he does not relate his beliefs to religious training or to a Supreme Being. In the *Berman* case there was a dissenting opinion, and that dissent is based upon the fact that the registrant had signed the appropriate series on the Classification Questionnaire in which he claimed to be a conscientious objector by reason of religious training and belief. In the present case even this objection is met, for at the time appellant signed Series XIV in the Classification Questionnaire, he attached thereto a note saying that his beliefs were not religious but were political.

The fact that a hearing was granted and held in the first appeal, and granted and cancelled on the second appeal, did not change appellant's rights under the law. His rights were determined by the state of the record at the time he appealed, and the Board's action could neither increase nor diminish those rights, as the District Court said [T. R. p. 95]:

> "The fact that defendant was granted a hearing (to which, under the regulations, he was not entitled) which was subsequently cancelled, being merely voluntary on the part of the government, did not in any way affect the defendant's substantive rights."

B.

Appellant Was Not Entitled to Answer the Adverse Recommendation Made by the Department of Justice to the Appeal Board.

On both the first and second appeal the Department of Justice recommended to the Appeal Board that the claim of appellant for a conscientious objector's classification be denied. Appellant complains that he was not given opportunity to answer the adverse recommendations by the Department of Justice. However, appellant was not entitled to a hearing and recommendation at all, *supra* Point A, and it follows that whether he had an opportunity to answer the adverse recommendation is totally immaterial.

The Government does not concede that such a right exists. It is established that exemption by reason of religious training and belief is not a constitutional right.

United States v. MacIntosh, 283 U. S. 605;
Girouard v. United States, 328 U. S. 61.

The privilege not to bear arms comes from Congress.

Tyrrell v. United States, 200 F. 2d 8.

Only such rights of exemption and appeal exist as are granted by Congress. Neither Congress, in the Selective Service Act of 1948, nor the Selective Service regulations, grant a registrant the right to answer the recommendation of the Department of Justice. Indeed, the recommendation is advisory only, and the appeal board is not bound to follow it.

United States v. Nugent, 346 U. S. 1.

Further, the requirements of due process are fully met when, before the hearing officer, the registrant is advised of the adverse evidence against him and given an opportunity to refute it.

United States v. Nugent, supra.

C.

The Trial Court Properly Quashed the Investigative Reports of the Federal Bureau of Investigation.

The F.B.I. reports were totally immaterial to any issues presented at the trial. The purpose of the F.B.I. reports are to advise the hearing officer of information which may assist him in determining the character and good faith of the objection of a registrant who claims a conscientious objector's classification. Referring again to the argument submitted in Point A of this brief, we can assume that the appellant is sincere in everything he states to the Local Board, but Congress has specifically excluded the beliefs he asserts as a grounds for a conscientious objector's classification. In the letter of recommendation from the Department of Justice dated July 29, 1952 [Ex. 1, p. 64], the Department states that appellant's answers in the Selective Service Questionnaires, "clearly show that his objections to war are not religious but are political and philosophical." These are practically the appellant's own words which he submitted to the Local Board. What the F.B.I. reports reveal could be of no possible aid to the Appeal Board in deciding appellant's case. It simply did not make any difference whether he was sincere in his beliefs or not.

D.

Appellant Was Not Denied Due Process by the Local Draft Board.

Appellant urges that he was denied due process by the failure of the Local Draft Board to post a list of advisors to registrants in the Local Board Office. The testimony of Colonel Hartwell [T. R. p. 43] reveals that there are 145 individuals in Los Angeles County who are known as "registrars," and 48 local draft boards. Selective Service Regulation 1604.41 describes the duties of an advisor "to advise and assist registrants in the preparation of questionnaires and other Selective Service forms, and to advise registrants on other matters relating to their liabilities under the Selective Service law." The testimony of Colonel Hartwell reveals that these duties are performed by individuals in California known as "registrars." In addition, the Clerks and Government Appeal Agents are available to advise registrants. A change in title, or the failure to post names could not deny appellant due process. One need only look at appellant's Selective Service file to realize that he is a person who was fully capable of reading, understanding, and completing the Selective Service forms, and it is clear that he understood his liabilities under the law. Nowhere can it be shown that appellant lost or waived some right he had because he was not properly advised concerning it. On examination [T. R. p. 53] appellant admitted that he had never consulted with the people at his Local Board, asked them for advice, or inquired where he might get advice. The most that can be said of the failure to have something known as "advisors" and to have their names posted is that it is an irregularity, a harmless error, which in no way affected the substantial rights of appellant.

In appellant's brief at page 33 he quotes Judge Peirson M. Hall in the case of *United States v Kariakian,* No. 23223, S. D. California, Jan. 13, 1954. Even this very brief extract from the comments of Judge Hall reveal that he was not passing upon the question of advisors to registrants under SSR 1604.41, but rather was stating that a registrant is entitled to be advised that he has the right to request a fair summary of the adverse evidence before a hearing officer of the Department of Justice.

E.

The Trial Court Properly Excluded the Testimony of the "Interpreters" Offered at the Trial to Interpret the Beliefs of the Appellant.

In appellant's brief at page 38, in the last paragraph, he quotes the following offer of proof in regard to the testimony of the two ministers:

> "This witness would give the opinion that he also (referring to appellant)—although the defendant denies it—he also believes in a Supreme Being."

In other words, appellant offered to show at the trial that although he personally does not believe in a Supreme Being, he has available two men who will testify that he does. Basically, the question is not so much what appellant believes, but what he said he believes, and the Local Board is surely entitled to take appellant at his word.

In *Berman v. United States,* 156 F. 2d 377, the Court said, in reference to the phrase "by reason of religious training and belief,"

> "We think the latter phrase must be regarded as a definite limitation on the scope of the exemption and cannot be deprived of its effectiveness by specious

reasoning that something which to its user is more acceptable than some other thing is therefore the same thing."

At page 381 in the *Berman* case the Court says:

"* * * No matter how pure and admirable his standard may be, and no matter how devotedly he adheres to it, his philosophy and morals and social policy without the concept of deity cannot be said to be religion in the sense of that term as it is used in the statute."

And at page 382:

"We may add with propriety that to sustain appellant's thesis, we should, in effect, be deciding that the exemption from military service read into the statute runs to all who sincerely entertain conscientious objections to participation in war. Should we come to that conclusion, the phrase 'by reason of religious training and belief' would have no practical effect whatever."

In *George v. United States,* 196 F. 2d 445, this Court said:

"* * * It is evident that the definition which the Congress introduced into the 1948 Amendment comports with the spirit in which 'religion' is understood generally, and the manner in which it has been defined by the courts. It is couched in terms of the relationship of the individual to a Supreme Being, and comports with the standard or accepted understanding of the meaning of 'religion' in American society."

The *Berman* case also involved an attempt to "interpret" appellant's beliefs as religious beliefs. In that case the issue had apparently not been raised at the trial. Certain

appendices were included in appellant's brief in that case, which consisted of letters about the appellant, and in two instances opinions by ministers that the appellant really was religious. Another letter was from a college professor, about which the Court said:

> "The letter, as it seems to us, amounts in the last analysis to the professor's conclusion that a conscientious belief in any social theory, with the object of benefit to man, is a religious belief."

That is, in effect, what we have in this case. As appellant himself stated, although he does not believe in God, although his objections to war are not religious, there are some people who would interpret his beliefs as being otherwise. This is clearly immaterial and the District Court properly ruled that such evidence was inadmissible.

F.

The Supreme Being Clause in the Selective Service Act of 1948 Is Constitutional.

The claim that laws requiring compulsory military service are unconstitutional has often been raised. In *Richter v. United States,* 181 F. 2d 591, this Court said:

> "This claim, in one guise or another, was advanced again and again during the first World War, as well as the second World War, and was uniformly rejected by the courts."

That case, however, did not pass upon the Supreme Being clause in the 1948 Act, and it is only that clause which is being attacked herein. The matter of the Supreme Being clause was really settled in the *Berman* case when the Court held that "religion" meant a duty and responsibility to an authority higher and beyond any worldly one; in effect, a duty to a deity. Thus, the Supreme Being

Amendment to the 1940 law was really only a congressional expression of the existing law which had been declared constitutional.

Richter v. United States, supra.

Appellant first urges that the Supreme Being clause offends the Sixth Article of the Constitution:

> "* * * No religious test shall ever be required as a qualification to any office of public trust under the United States."

He argues that because many conscientious objectors prefer prison to surrendering their scruples they become felons and, therefore, ineligible for public office. But the *duty* of military service is there for all to perform, and only by the grace of Congress are certain groups excluded. There is no constitutional right to exemption from military service on any ground.

Richter v. United States, supra.

It goes without saying that this does not constitute a religious test for public office, for the law does not require religious conformity—it only requires that those whom Congress has not exempted from military service perform their duty to serve. Any objector to military service can readily avoid conviction of a felony by the simple device of entering the military service.

Appellant next asserts that the Supreme Being clause offends the First Amendment of the Constitution: "Congress shall make no law respecting an establishment of religion * * *." Appellee does not intend to engage

in a battle of semantics with appellant over the meaning of the words "religion" and "Supreme Being." The matter of the meaning of those words and their constitutionality was settled in the *Berman* and *George* cases, *supra*. In the *George* case the Court cited the principle that there is no constitutional right to exemption from military service because of conscientious objection or religious calling. It then said:

> "This being so, there is brought into play the familiar principle that whatever the government, state or federal, may take away altogether, it may grant only on certain conditions. Otherwise put, whatever the government may forbid altogether, it may condition even unreasonably. Outstanding in this domain are the cases dealing with intoxicating liquors. * * *
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> * * * * * * * *
>
> "The latest illustration of this familiar norm of constitutional law is the Federal Tort Claims Act, 28 U. S. C. A., Paragraphs 1346(b), 1402(b), 2674. As this involves a waiver of sovereign immunity, Congress could constitutionally provide that no jury should be had, 28 U. S. C. A., Paragraph 2402, despite the provisions for jury trial in the Seventh Amendment to the Constitution.
>
> "In sum, as the exemption from participation in war on the ground of religious training and belief, can be granted or withheld by the Congress, the Congress is free to determine the persons to whom it will grant it, and may deny it to persons whose opinions the Congress does not class as 'religious' in the ordinary acceptance of the word. * * *
>
> * * * * * * * *

"So it is evident that the definition which the Congress introduced into the 1948 Amendment comports with the spirit in which 'religion' is understood generally, and the manner in which it has been defined by the courts. It is couched in terms of the relationship of the individual to a Supreme Being, and comports with the standard or accepted understanding of the meaning of 'religion' in American society. * * *

* * * * * * * *

"Political, sociological, philosophical and ethical grounds for opposing war are so distinct from opposition induced by religious training and belief that, aside from the considerations just adverted to, the Congress could very well recognize the latter as a ground for exemption and refuse sanction to the former. Even if we were not dealing with the plenary power to provide for the defense of the Country, such classification would meet all the accepted tests of due process."

And in *Rase v. United States,* 129 F. 2d 204, 210:

"No question of religious liberty, in any true sense, is here involved, and the zealous and ill-advised pursuit of a martyr role is not, by the sanction of the Constitution, permitted to imperil national safety. * * *."

VI.
CONCLUSION.

The District Court properly denied the Motion for Judgment of Acquittal at the close of all the evidence.

The District Court properly found the defendant guilty and there is substantial evidence to support that finding.

There was no error of law in the ruling of the District Court in refusing to permit the appellant to give immaterial explanations of his answers to the Court's questions.

Respectfully submitted,

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